

No. 12,455

IN THE
United States Court of Appeals
For the Ninth Circuit

JIM YUEN JUNG,

Appellant,

vs.

BRUCE G. BARBER, District Director
for the Immigration and Naturali-
zation Service, San Francisco,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

Appellant filed his appeal on March 6, 1950, from an order denying his petition for naturalization entered in the District Court of the United States for the Northern District of California dated November 30, 1949, upon his failure to establish to the satisfaction of the District Court that he had been a person of good moral character as required by Section 324(a) of the Nationality Act of 1940. (8 U.S.C.A. 724(a)) under which Section he filed his petition.

His appeal designates Bruce G. Barber, District Director for the United States Immigration and

Naturalization Service, San Francisco, as the appellee. The appeal is ineffective because the appellee designated is not, and cannot be made to be, the proper party litigant in this proceeding since he is not empowered by Congress to grant the relief sought in plaintiff's bill of complaint.

The administration of the immigration and naturalization laws is placed generally under the authority of the Attorney General of the United States. *Congress has entrusted to the courts alone the power to grant or deny citizenship.* 8 U.S.C. 701. (See Appendix, note a.) The District Director of the United States Immigration and Naturalization Service is powerless to grant the relief sought by the appellant.

The United States of America is the only proper party to be named as appellee.

In the case of *Bonham, District Director of Immigration v. Chi Yan Chaim Louie*, 166 F. (2d) 15, and in *Carmichael v. Wong Choon Hoi*, 164 F. (2d) 696, the Ninth Circuit Court dismissed appeals where the local district director of the Immigration and Naturalization Service sought to bring the action in his own name. The Court held he was not a proper party to the litigation. Furthermore, a motion to substitute the United States of America as appellant in the *Chi Yan Chaim Louie* case, supported by the appellee's stipulation that the United States be so substituted, was denied on the ground that such stipulation could not confer jurisdiction.

It seems clear, therefore, that in this case, as in those above cited, the appeal should be dismissed for lack of the proper party defendant.

STATEMENT OF THE CASE.

The appellant was born in China on July 12, 1912. (T. 25.) On March 13, 1941, he applied for entry into the United States as a United States citizen claiming to have been born in San Francisco, California. (T. 25.) He conspired with others in this design and presented fraudulent affidavits to support his claim. (T. 25.) Upon discovery of the attempted fraud an order excluding him from the United States was made by a Board of Special Inquiry, and on appeal to the Board of Immigration Appeals the order was sustained. Due to the war, however, he could not be sent back to China, and he was released on bond. (T. 25.)

On July 2, 1942, in his Selective Service questionnaire he again falsely claimed birth in San Francisco. Thereafter he secured deferment from induction on the ground of his occupation as a chicken rancher. Later he worked for a while in the shipyards, and then went into the restaurant business. (T. 15, 25.)

On October 1, 1945, he was apprehended and indicted for failure to report his change of status. (T. 25.) He was sentenced on November 27, 1945, to a term of six months in prison on this charge. (T. 26.) (This sentence being imposed by Hon. Louis

E. Goodman, the Judge hearing the petition for naturalization of the appellant.)

On May 17, 1946, he enlisted in the United States Army and again claimed birth in the United States. (T. 15.) He was still serving therein when his petition for naturalization came before the District Court for final hearing on November 23, 1949. (T. 26.) On November 30, 1949, the District Court denied the petition for the reason that he had failed to establish good moral character as required by Section 324(a) of the Nationality Act of 1940, (8 USC 724a). (T. 20.) Although the Army authorities were informed of the subject's alienage they replied that no action was contemplated toward discharging him since the Army regulations governing the case made no provision for discharges of that nature. (T. 27, 29.)

On November 18, 1949, the petitioner finally admitted that he had been born in China, had procured the fraudulent affidavits there, and had claimed to be a native-born citizen of the United States because that was the only way to obtain entry into the United States. (T. 17.)

CONTENTIONS OF APPELLANT.

The appellant contends that his petition for naturalization should have been granted for the following reasons:

- (1) Because Section 324(a) requires the applicant to establish only that he served in the

armed forces of the United States for the requisite period under honorable conditions. (T. 32, 33.) (Appellant's Brief, p. 5.)

(2) That a duly authenticated copy of his service record setting out that fact is conclusive evidence of his good moral character. (Appellant's Brief, p. 5.)

ARGUMENT.

Throughout the history of naturalization legislation Congress has placed wide discretion in the courts in matters of so general and important a prerequisite as good moral character. What conduct on the part of a petitioner for naturalization does or does not constitute good moral character is a matter of fact within the sound judgment of the trial Court. *U. S. v. Bischof*, C.C.A.N.Y. 1931, 48 F. (2d) 538. *U. S. v. Beda*, C.C.A.N.Y. 1941, 118 F. (2d) 458. *Petitions of Rudder*, 159 F. (2d) 659, 697. The question is to be determined from the facts of each particular case. *Daddona v. U. S.*, 170 F. (2d) 964, 966:

“Good moral character for the prescribed period is a question of fact.”

The appellant contends, in essence, that once his Army service record was placed in evidence the trial judge was estopped from further consideration of his fitness for citizenship with respect to his moral character. In support of this view appellant cites the case of *In re Fong Chew Chung*, 149 F. (2d) 904, for the

generalization that the trial Court could not go back of the honorable discharge. In that case, however, although the military authorities had officially certified the petitioner as having served honorably, the District Court nevertheless—having reason to believe that the petitioner's ignorance of the English language was assumed only for the purpose of effecting his quick discharge from the Army—concluded that the soldier had not “served honorably” and, in fact, had not “served” at all within the meaning of the naturalization statute.

In the instant case the Court accepted the appellant's military record for all it purported to be, but held that notwithstanding the Army's certification, the petitioner by his conduct during the statutory period preceding his petition had failed to establish his good moral character. From the facts the cases are clearly distinguishable, and the case cited by the appellant is not in point on the issue here.

It is submitted that the trial court in the instant case did not commit error, since the policy of the courts has consistently been to deny naturalization to aliens violating our laws during statutory probationary periods. *Turley v. U. S.*, C.C.A. Wyoming, 31 F. (2d) 696. An alien who was in every way qualified for citizenship except that he had violated the immigration laws of the United States by smuggling another into the United States, was held not entitled to citizenship. *In re Nybo*, C.C.A. Mich. 1930, 42 F. (2d) 727. Where petitioners have deliberately made false statements regarding citizenship or other mate-

rial matters the courts have generally denied their petitions. In *Petition of Ledo*, D.C.R.I. 1946, 67 F. Supp. 567, the petition was denied because the applicant had made false statements under oath to a naturalization examiner and had represented himself to officials at a United States Navy Base depot that he was a citizen of the United States.

An applicant for citizenship has the burden of showing that he has behaved as a person of good moral character for the requisite period of time. *Petition of Zele*, C.C.A.N.Y. 1942, 127 F. (2d) 578.

It will be noted that under Title 8, USC, §724(b), it is provided that a petitioner for citizenship under this section shall comply in all respects with the requirements of Title 8 USC, §707, except that

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the Court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section.

The instant appellant filed his petition for naturalization in the Court below under Title 8, §724. This section does not indicate any intention to exempt from the usual requirements of good moral character or attachment to the principles of the Constitution of

the United States, and favorable disposition toward the good order and happiness of the United States, any petitioner for naturalization under this section. This will readily appear by reference 2. (See appendix.)

It will be noted in this connection that Title 8, USC, §724(e) specifically mentions that a petitioner for citizenship under 8 USC, §724 is expected to show good moral character as is required under the basic provisions of section 707(a).

The government in this case is not in any degree challenging the certification that the appellant did perform honorable military service in accordance with the requirements of the United States Army, but it is submitted that the admitted conduct of the appellant, both prior to and including the statutory naturalization period was such as to clearly support a finding by the trial Court that he had not established his good moral character to the Court's satisfaction, as required by law.

Congress could never have intended the granting of citizenship to one who was not attached to the principles of the Constitution of the United States, nor of a person not of good moral character, merely because of service in the military forces of the United States; such a construction if carried to its logical extreme would require the naturalization of persons convicted of treason, espionage, rape, murder, or other heinous crimes.

THE CONTENTION OF THE APPELLANT THAT AN HONORABLE DISCHARGE FROM THE UNITED STATES ARMY IS CONCLUSIVE EVIDENCE OF GOOD MORAL CHARACTER IS NOT IN ACCORDANCE WITH THE OPINION OF THIS COURT IN *UNITED STATES v. SAMUEL HARRISON*, No. 12,354, DECIDED MARCH 24, 1950.

CONCLUSION.

The appellee feels that the order of the District Court of the United States dated November 30, 1949, denying the petition of the appellant for citizenship was proper and should therefore be affirmed.

Dated, San Francisco, California,
March 29, 1950.

Respectfully submitted,

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(Appendix Follows.)

Appendix

Section 324(a) of the Nationality Act of 1940 (8 U.S.C.A. 724(a)), provides as follows:

A person who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions may be naturalized without having resided, continuously immediately preceding the date of filing such person's intention, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after termination of such service. (54 Stat. 1149; 8 U.S.C. 724.)

(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that—

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of

this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service. (54 Stat. 1149; 8 U.S.C. 724.)

(c) In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of the United States, in the same manner as required by section 309. Such verification and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization. (54 Stat. 1149; 8 U.S.C. 724.)

(d) The petitioner shall comply with the requirements of section 309 as to continuous residence in the United States for at least five years and in the State

in which the petition is filed for at least six months, immediately preceding the date of filing the petition, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service shall be considered as residence within the United States or the State. (54 Stat. 1149; 8 U.S.C. 724.)

(e) Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of affidavits and testimony or depositions of witnesses. (54 Stat. 1149-1150; 8 U.S.C. 724.)

NOTE: 8 USC §701. Jurisdiction to naturalize:

“(a) Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States now existing, or which may hereafter be established by Congress in any State, District Courts of the United States for the Territories of Hawaii and Alaska, and for the District of Columbia and for Puerto Rico, and the District Court of the Virgin Islands of the United States; * * *”.

